In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAMUEL E. MOIST. } No. 378.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The case comes up under the criminal appeals act (34 Stat. L., 1246) the trial court having sustained a demurrer interposed on the ground that the indictment was insufficient in law.

No opinion was rendered below.

The indictment charged unlawful use of the mails in furtherance of a scheme to defraud.

The statute to be construed is section 215 of the Criminal Code (35 Stat. L., 1130), formerly section 5480 Revised Statutes., which reads as follows:

> SEC. 215. *Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,* or to sell, dispose of, loan,

exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation, or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, or by what is commonly called the "sawdust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be

> delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. (35 St. L., 1130.)

The gist of the indictment (Tr., pp. 1–6) is as follows:

The defendant, who was in the piano business, put out advertisements containing so-called "puzzle pictures," with the announcement that he would give for the "neatest correct answer" a "credit order" for $350 on a certain piano, and for the "next neatest correct answer," a credit order for $300; and for 50 other "correct answers," credit orders for $200 each. There were also certain jewelry prizes not material to the point in this case.

His scheme was, when the answers came in, to send out letters, the material portion of which was as follows:

> Mrs. M. J. Rosentaul.
>
> Dear Friend: You have been awarded one of the largest credit orders for your answer to our puzzle. This letter is your order to select any new piano of our make, and receipt for $200 will be given you on account, and the balance may be paid in monthly payments. After your selection, you will be given one of our 14K. diamond rings (ladies' or gentlemen's), absolutely free.
>
> Should you decide on any of the ten other makes of new pianos we sell, you will be credited $150.

> Do not fail to see the beautiful piano we are offering for $225 during our special sale which we are now having. Do not write but come to our salesroom and see the greatest piano bargains ever offered in this State. This piano is sold the world over for $300, and all it will cost you with the advance price order is $75.

But when this Mrs. Rosentaul, for instance, presented herself and tendered her hard-earned "credit order," together with her $75 in cash, and called for the piano "sold the world over for $300," and offered on "special sale" "for $225," she would receive not a $300 piano, so being offered to the ordinary public at $225, but a piano which ordinarily sold for $75—precisely the amount of her cash payment. The so-called prize credit order was a mere fiction, devised to deceive Mrs. Rosentaul into giving the defendant $75 on the understanding that she was to receive a $300 article which, even on "special sale," non-prize winners could get only by paying $225.

Because the indictment did not allege that the pianos to be delivered were worth less than the amounts of cash to be taken from the "prize-winners"[1] the demurrer was sustained.

Of course the Government's contention, and the theory of the indictment, was that the purchasers were entitled to get whatever in fact they were promised—the *consideration* for which they gave their money.

[1] There was an allegation (fol. 7) that they were "of little or no value," but the trial court evidently construed this as not serving the purpose, and here we accept that construction.

ARGUMENT.

The trial judge rendered no opinion, but it is evident from the briefs and arguments before him that he followed *Miller* v. *U. S.* (174 Fed., 35) decided by the Court of Appeals of his Circuit (Seventh). In that case the Marinette Gas Engine Co. wrote to the intended victims that it wanted branch managers (which was false) who were to receive $250 a month and profits, and that it was earning a profit of 20 per cent (which was false), and paying 6 per cent on its stock (which was false), all these misrepresentations being intended to induce the victims to purchase stock at par. The Court of Appeals set aside the convictions on the ground that the arousing of false expectations of employment or of an investment paying 20 per cent did not violate the statute; and it was not charged that the stock itself was not worth the price. They ruled that—

> to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit and artifice (p. 39).

and, in short, as they fully explain (p. 39), it is no fraud under the statute to promise a man one thing and give him another, unless it is also shown that whatever he does get is of less value than whatever he parts with.

The *Miller* case plainly disregards fundamental principles of commercial fair dealing. A man is entitled not merely to what may ordinarily be sold to

the public at the price he is paying, or to what may be estimated by anybody else in the world (or everybody else in the world) as worth that price, but to whatever he himself offers his money for. Our Mrs. Rosentaul, as the defendant knew, was not willing to give her precious $75 for a piano ordinarily sold at that price. In order to get *her* $75, the defendant had to offer something more—namely a $300 piano. That was the whole reason for his hocus pocus of advertisements, letters, "jewelry," "puzzle pictures," and "credit orders." They were necessary to make her *believe*, guileless soul, that what she saw was really a $300 piano, and that the defendant was going to let *her* (the solver of the puzzle) have it on better terms than anyone else in the world. If she had been willing to give *her* $75 for what everyone else could get for $75, Moist would have needed none of his elaborated artifices.

Commercially and morally it was a deception and a cheat—aimed, as most of these schemes are, at the multitude of gullible persons who are eager to get rich quick, or who can not resist "buying what they don't want, because it's cheap."

The decision, however (to quote the words of *Miller's* counsel), distinguishes "*criminal* fraud from *commercial* fraud," and the question is whether this statute intends to draw any such distinction.

Certainly the language of the statute gives no hint of any such limitations. It is as broad as it can be:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or

> for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. * * *

Durland v. *U. S.* (161 U. S., 306) has always been considered (except by the *Miller* case) to have swept away all these fine-spun technicalities and to have established for this language the broadest construction, covering every kind of moral, commercial cheat. Indeed, the first concern of the court in that case was to point out that—

> So far as the moral element was concerned it must be taken that the defendant's guilt was established (p. 312),

and the court then proceeded to dismiss the defendant's contention that the statute reaches only such cases as at common law would come within the definition of "false pretenses." The defense was that there was no misrepresentation of "an existing fact," but only an intended breach of contract. The court's statement of its conclusion as follows has always been taken as the classic definition of the law under this statute:

> The question thus presented is one of vital importance and underlies both cases. We can not agree with counsel. The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. * * * (p. 313).

But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that *nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.*

In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretence of a bond without a thought that he or the company would ever make good its promises. It was with the

> purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and *it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise.* This, which is the principal contention of counsel, must be overruled (pp. 313–314).

It was not claimed in the *Durland* case that the Government had to allege and prove anything but that the bonds were not as represented. The idea that it was essential to prove further that they were not really *equal* in value to the price did not occur to anyone.

The precise contention has, however, been made in other cases and overruled, always on the authority of the *Durland* case.

> *Harris* v. *Rosenberger*, 145 Fed. 449 (C. C. A., 8 C. Van Devanter, J.)
> *Kellogg* v. *U. S.*, 126 Fed., 323. (C. C. A., 2 C.)
> *Wilson* v. *U. S.*, 190 Fed., 427, 433. (C. C. A., 2 C.)
> *U. S.* v. *Palmieri*, 169 Fed., 490. (C. C., S. D. N. Y.)

Harris v. *Rosenberger* was written by Judge (now Mr. Justice) Van Devanter. The misrepresentations were that the whisky advertised was nine years old and was sold cheap because the seller was the distiller

and employed no middlemen. The court below had held (136 Fed. 1001) that the scheme did not violate the statute because the purchaser got a fair equivalent for his money. The Court of Appeals reversed this judgment, following the broad view of the statute laid down in the *Durland* case. Mr. Justice Van Devanter quoted from that case, and reviewed a number of other cases including Mr. Justice Day's opinion, when circuit judge, in *Horman* v. *U. S.* (116 Fed. 350), and summarized his conclusion as follows:

> Our conclusion is that when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons, by means of false representations, to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually being sold, it becomes an objectionable scheme or device within the intendment of sections 3929 and 4041, although what is being sold may approximate in commercial value the price asked and received. The difference between such a scheme or device and those where nothing whatever or nothing at all equivalent in value is intended to be returned for the money obtained is one of degree only, but not of principle. Both are grounded in deceit, operate injuriously upon the public, and constitute the obtaining of money by means of false pretenses. A purchaser is entitled to receive what he is induced by the vendor's representations to believe

> he is ordering and paying for, and not something which he does not order and may not want at any price.

Kellogg v. *U. S.* involved circulars inviting the recipients to send money for investment, and misrepresenting the status, condition, and prospects of the advertiser and his undertakings. The defendant claimed that the indictment was defective in that it did not charge any intent not to invest the money for the owner's benefit.

The Court of Appeals (second circuit) affirmed the conviction. This case was followed by Judge Chatfield in *U. S.* v. *Palmieri, supra*, rejecting a defense that the stock offered on false representations was still not shown to be worth less than the price charged.

The *Wilson* case involved the wireless telegraph speculation frauds (the prosecution which came to this court on a question of contempt and privilege of witnesses, 221 U. S., 361). The defendants claimed that there was nothing to show that the stock was worth less than the price paid, but the court adhered to its former decision in the *Kellogg* case, and after quoting from the *Durland* case, made the following statement, which is particularly applicable here:

> * * * We are of the opinion that a scheme or artifice is established by proof of false and fraudulent misrepresentations by which a person's right of open and fair dealing is invaded; that having shown that the defendants used false and fraudulent means to

> induce persons to part with their property and to purchase stock which was not of the value represented, the Government was not required to go further and prove either the existence or extent of damage to the purchasers.
>
> Any other construction of the statute would deprive it of all force in dealing with fraudulent schemes in the guise of legitimate corporate enterprises and would place a premium on lies and deceit. It would only be necessary to deal in a stock of uncertain value, e. g., of a corporation owning patent rights, and all the false and fraudulent statements imaginable could be made with impunity and the mails be used to prey upon the public. Purchasers would not obtain that which they were promised; their money would be obtained by false and fraudulent representations, but in how many cases could the Government show that they failed to get their money's worth? How could the real value of such shares be established (p. 434)?

The court expressly rejected the *Miller* case, saying:

> In so far as *Miller* v. *United States* (174 Fed., 35) is in conflict with these views we are unable to follow it (p. 434).

In the same spirit with these cases, though not deciding the precise point, are Judge (now Mr. Justice) Day's opinion in *Horman* v. *U. S.* (C. C. A. 6th C.; 116 Fed. 350) affirming *U. S.* v. *Horman* (118 Fed. 780), the opinion of the Court of Appeals for the Eighth Circuit in *Horn* v. *U. S.* (182 Fed. 721), the

last word of this court on this statute in *U. S.* v. *Stever* (222 U. S. 167), and the decision in *Hale* v. *Haas Henkel* (216 U. S. 462).

Among the numerous State court decisions holding that proof of loss in dollars and cents is not essential to proof of fraud, even at common law, are—

Culver v. *Webb*, 12 Conn. 441.
Murray v. *Jennings*, 42 Conn. 9.
Williams v. *Kerr*, 152 Pa. St. 560.
Pendergast v. *Reed*, 29 Md. 398, 404.

And so even of the crime of obtaining money by false pretenses:

Comm. v. *Judd*, 2 Mass. 329, 335–6.
People v. *Oscar*, 105 Mich. 704.
Comm. v. *Coe*, 115 Mass. 481.

CONCLUSION.

The judgment should be reversed.

WINFRED T. DENISON,
Assistant Attorney General.

SEPTEMBER, 1913.

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Supreme Court, U. S.
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JAMES H. McKENNEY,
Clerk

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BRIEF FOR SAMUEL E. MOIST, DEFENDANT IN ERROR.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR SAMUEL E. MOIST, DEFENDANT IN ERROR.

STATEMENT.

On the question of value the indictment charges that it was the intention of the defendant not to deliver pianos of a value equal to the cash payments plus the amount of the credit orders but to deliver "a different and other piano of the retail price of, to-wit: not to exceed the said difference so to be paid to the defendant by each of said persons intended to be defrauded as aforesaid, and of little or no value." (Tr., p. 4.)

We do not know why the demurrer was sustained; no opinion was rendered and it does not necessarily follow from the record that the indictment was held defective because it was not alleged that the pianos to be delivered were worth less than the cash paid. Our contention is and has been two-fold: First, that as a general proposition there can be no crime under the statute in question without an intention to inflict property loss; and second, that this particular indictment was bad because as a matter of charging value it was duplicitous.

ARGUMENT.

I.

Even if the abstract proposition contended for by the Attorney General is sound the indictment is bad because it is duplicitous. The defect cannot be cured by the assertion of the Attorney General that he will ignore a certain allegation now found in the indictment. The defendant is left entirely without a formal statement of the Government's position on the value question. As now pleaded the charge is that the pianos in question were sold for $75 *and were of little or no value*. This charge is obviously in the alternative and leaves us entirely uncertain as to the kind of case which the Government proposes to make. We are entitled to know whether the Government in the trial of this case intends to stand wholly on the matter of selling price or intends to attempt proof of value. As the indictment now stands the prosecution may do either of these things and its position cannot be controlled by any assertions now contained in the briefs. The indictment as it now stands may be supported by proof that the pianos in question had no value. In like manner it may be supported by proof that the pianos had *little value*. That phrase is a wholly elastic and inappropriate phrase for an indictment. A decision that this indictment is good and that the demurrer should be overruled would constitute a judicial holding that proof of any one of these alternative averments will warrant a conviction. We argued this po-

sition in the court below and think that the court adopted our position as the sound one and paid no especial attention to the abstract question now argued by the Attorney General.

It is a familiar rule that an indictment should specifically inform the defendant of the charge which he will be called upon to meet and that indictments in this alternative form are bad. For cases of this kind see:

State v. *Gary*, 36 N. H., 359.
Commonwelth v. *Grey*, 68 Mass., 501.
People ex rel. Schuler v. *Schatz*, 50 App. Div., 544.
Clifford v. *The State*, 29 Wis., 327.
Robeson v. *The State*, 3 Heisk, 266.

II.

We further submit that to defraud under the statute in question necessarily involves *the infliction of property loss*, and that in the absence of a specific averment that the pianos were worth less than the cash amount paid for them the indictment is bad in substance. That is precisely the case of *Miller* v. *United States*, 174 Fed. Rep., 35. Our position is that this indictment falls clearly within the principle of the Miller case and that the Miller case is decisive.

The Miller case was an indictment under Section 5480 of the Revised Statutes, which has since been incorporated without substantial change in the Penal Code as the section (215) now in question. In that indictment there were three counts. There was a gen-

eral verdict of guilty on all three counts, and a judgment and sentence upon the general verdict. The facts out of which the case arose are stated by the Court of Appeals substantially as follows: A manufacturing company of which Miller was an officer had increased its authorized capital and was desirous of disposing of the additional stock. For this purpose Miller and others gave out that the company desired to open branch sales offices through the United States and was seeking managers for these branch offices; that such managers were to be paid salaries of Two Hundred and Fifty Dollars a month and have shares in the profits, and that the company was earning and paying substantial dividends. It was charged that the purpose of these representations was to effect the sale of fifty shares of stock to each of the persons addressed, and that it was not intended to employ any of them as branch house managers; that various persons did in fact come to Chicago to talk over the matter with the officers of the company and were induced to enter into contracts for the purchase of fifty shares of stock each, at par. The officers of the company never intended that the transactions with these persons should go any further than this; the representations with regard to the intended employment of branch house managers were mere lures by which purchasers were attracted to buy stock.

But in two of the counts of the indictment there was no averment whatever respecting the value of the stock; for ought that appeared in these two counts the stock may have been worth all that the purchasers paid for it. The third alone averred that the stock was not worth the amount paid.

The parallel between the Miller case and the case at bar is very apparent. As is charged in the case at bar, the device involved in the Miller case attracted persons to Chicago from remote distances. As in the case at bar time and money had been expended by persons attracted to investigate and invest. So two of the counts in the Miller case, like the indictment now under consideration as we have analyzed it, omitted to charge that a full equivalent was not given for value received. In the Miller case the stock may have been worth par; in the case at bar the pianos may have been worth the cash paid. The depriving in the Miller case was of a prospective employment which had never existed in fact; the depriving in the case at bar was of an imaginary discount.

The Circuit Court of Appeals reversed the judgment against Miller solely because of a single material error, which, as the court says, governed the prosecution of the case and ran throughout the trial. The Court of Appeals states the position of the Government as follows:

> "That apart from any intention upon the part of the plaintiffs in error actually to deprive the persons named of the money, or other thing of value that such persons might be induced to give up, there would be an offense under Section 5480, provided there were put forth, as a part of the alleged scheme, false and fraudulent pretenses, known at the time to be false and fraudulent, which were intended to deceive the persons to whom they were made, even though such pretenses would result in depriving such persons of nothing that they contributed, apart from the mere expectations excited. In other words, it is contended by the Government, and the con-

tention is supported throughout in the rulings at the trial, that although the scheme alleged in the first two counts was not one through which any one would suffer any actual money loss or injury —be any worse off, except in the matter of disappointed expectations, after than before it— an offense under the section is nevertheless committed, provided the pretenses embodied in the scheme, and the expectations excited thereby, were in fact false pretenses and a false expectation, known by the party making them to be false at the time made."

Of this theory of the case, the Court of Appeals said:

"Because of the application of this view of the section of the statute in question, there runs throughout the whole record errors that make the trial, in all its branches, erroneous."

Judge Grosscup's analysis of the case is extremely penetrating. He says:

"The mere intention of the plaintiffs in error not to meet the expectations of the persons responding to the letters, in the matter of their employment as branch house managers, and of their salary and profits in consequence thereof, and of the earnings of the Company and the dividends therefrom, *do not in the absence of intended loss or injury to such persons in the investment made*, constitute, in our opinion, a crime under Section 5480."

Certain cases were cited on behalf of the Government in an effort to support the contention that the false expectations excited, apart from any actual loss intended, constitute a crime under this section. The court analyzes these cases and proceeds as follows:

"It will thus be seen that in all these cases there is present, as an essential element of the

scheme, the intention to defraud the persons addressed, not out of expectations excited (the expectations were the means used only) but out of the money, or a portion thereof, contributed by them to the scheme. In none of these cases is the mere false pretense or misrepresentation, apart from an actual intended deprivation of the person addressed of the money obtained, held to be an offense under the section in question. In other words, in all these cases *the gist of the offense is the actual or intended injury to the person sought to be reached—the fraudulently depriving him of something he already has*—in none of them is the deprivation of the person addressed of only that which he is led to expect, made the basis of the prosecution.

Suppose that Matson and Foster, the persons named in the first two counts, did not get employment, would they be defrauded, provided they got their outlay back? Defrauded of what —of the expected employment? Apart from what was falsely held out to them, they had no claim on such employment. Defrauded of an investment that would pay twenty per cent.? Apart from what was falsely held out, they had no claim to such an investment. How can they be said to be deprived of anything that has no existence, except in the false promise itself; *and if there was no intention to deprive, there cannot, within the meaning of this section, be an intention to defraud; for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit and artifice.*"

Every line of Judge Grosscup's opinion is peculiarly applicable. In the indictment before us now, is there any intended deprivation,—any intended infliction of property loss? Paraphrasing Judge Grosscup's language,—suppose that Mrs. Rosenthal, the

person named in the indictment under consideration, did not get a *bona fide* discount for her credit order, would she be defrauded provided she got her outlay back? Defrauded of what—of an expected discount? Apart from what was falsely held out to her she had no claim to such discount. How can she be said to be deprived of anything that had no existence except in the false promise itself? *If there is no intention to deprive, there cannot be an intention to defraud; for to be defrauded the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit or artifice.*

In the multitude of decisions it would be hard to find a case more applicable; we submit that to the extent so far discussed the indictment falls clearly within the principle of the decision in *Miller* v. *United States.*

The position of the Government is said to be that the Miller case is not good law and that to defeat expectations created may amount to a fraud even though no property loss is inflicted. The authorities do not sustain this position.

In the Durland case, 161 U. S., 306, this court expressly states that "the defendant did not intend * * * that although money was received, any should be returned, but that it should be appropriated to his own use." (p. 312.) The only question in that case was whether deception in the *making of a promise* could constitute a fraud under the statute in question. No distinction whatever is drawn

in that case between a mere returning of the value previously given and a delivery of value in excess of the value received. The case turned entirely upon the quality of a false promise as a criminal deceit. That is not the case at bar.

There is nothing in the Stever case, 222 U. S., 167, that bears upon the present controversy at all. The present question is not in the case in any aspect.

The Haas case, 216 U. S., 456, was an indictment under Section 5440 of the Revised Statutes and separate sections, covering a different group of crimes and while it is there asserted that the United States can be defrauded without the actual infliction of property loss, the idea is clearly apparent that damage must be inflicted, that the Government must be worse off in a tangible, material way. It is nowhere said in this opinion that a mere withholding of expected benefits amounts to a defrauding.

There are some expressions in certain courts of appeals decisions which are opposed to our position, but we submit Judge Grosscup's opinion in the Miller case as by far the more logical and convincing analysis of the law.

The Government's theory appears to be that a fraud is involved because purchasers *do not receive value as represented*. In other words, we understand that the position of the Government is that the test of criminality under this statute is not whether a loss has actualy been sustained, but whether the thing that the purchaser has been induced to buy, has a lower value than he has been led to believe.

Applying this theory to the case under consideration the proposition would be that although it is not sufficiently denied in the indictment that the merchandise sold is not equal in value to the cash consideration paid, the purchasers are nevertheless defrauded *because they are induced erroneously to believe that they get value greatly in excess of the cash consideration paid.*

One answer to this suggestion is contained in Judge Grosscup's opinion in *Miller* v. *The United States.* The only thing which the purchaser of merchandise expects to receive and does not in fact receive, is the greater value. He gets the specific article of merchandise which he selects, and in this there is no deception nor deprivation; and the only thing which he believes he is to receive and does not receive, is the value of the merchandise as he is led to estimate it, and the value of the merchandise as it actually exists. Conceding, therefore, that it may fairly be said that he is deceived as to value, it clearly appears that even with this concession the only thing of which he is deprived is an imaginary value which has no existence except in the false belief. *The purchaser is not deprived of anything that he has a right to hold or claim as against the deceit and artifice, but is denied only the imaginary thing which exists solely by virtue of the deceit and artifice.* The Miller case covers this point with mathematical precision. AN EXPECTATION IS AROUSED OF GETTING SOMETHING FOR NOTHING, AND IT IS NOW CONTENDED THAT TO AROUSE THAT EXPECTATION IS CRIMINAL IF AT THE OUTSET IT IS INTENDED THAT THE EXPECTATION

SHOULD BE DISAPPOINTED. NOTHING IS TAKEN AWAY WHICH HAS EVER ACTUALLY EXISTED. THERE HAS BEEN NO DEPRIVING, NO DEFRAUDING, NO OBTAINING OF PROPERTY. THE IDENTICAL THING WHICH THE PROSECUTOR CLAIMS HE SHOULD HAVE RECEIVED AND DID NOT, IS THE VERY THING WHICH HE ALLEGES TO HAVE HAD NO EXISTENCE IN FACT. The Miller case is a complete answer to this particular suggestion.

But further as to this suggestion, and disregarding the Miller case,—even if the indictment were held to contain a misrepresentation as to value, it is uniformly held that a misrepresentation as to value does not constitute an actionable fraud. When parties are negotiating for the purchase and sale of property, real or personal, each has a right to exalt the value of his own property to the highest point his antagonist's credulity may bear, and depreciate that of the opposing party; and if there is opportunity to examine the property, such boastful assertions or exaggerated descriptions cannot be considered as amounting to fraudulent misrepresentation or deceit.

Miller v. *Craig*, 36 Ill., 109, 111.

Even a false representation with regard to value of a business,—a matter with regard to which the vendor is necessarily much better informed than the prospective purchaser,—has been held not to constitute a false pretense.

Reg. v. *Williamson*, 11 Cox C. C., 3-28.

The following cases are all to the same effect:

Commonwealth v. *Wood*, 142 Mass., 459.

State v. *Paul*, 69 Me., 215.

People v. *Jacobs*, 35 Mich., 36.

But it is conceded that in the indictment now under consideration there is no representation as to *value* which is sufficiently made. The most that can be said of the charge is that a representation is made as to *price;* and even if under peculiar circumstances a representation as to value may sometimes be said to be fraudulent, the same can never be said of a representation as to price. This proposition has been illustrated in the case of *Scott* v. *The People,* 62 Barb., 62.

In that case Scott had been indicted and convicted for obtaining the signature of one Wilson to six promissory notes of $1,000 each, by false pretenses in the purchase by the latter from Scott's co-defendant, Nicholson, of the title to one-half of a certain patent right. The pretense was with regard to the "real and true price" for the whole right. The charge in the indictment was that Scott and Nicholson falsely pretended and represented that the real and true price in money asked and fixed by Nicholson for the right, was $12,000, whereas, in truth, the true price in money asked and fixed for the said right by Nicholson was only $3,000. It appeared that Nicholson, who was the owner of the patent right, and who desired to sell it, had procured Scott to assist him in making the sale, informing Scott that he would sell for $3,000. Scott insisted, however, that Nicholson asked $12,000 or $15,000 so that Scott could also make something out of the transaction. As a result of these arrangements Scott brought Nicholson and Wilson together and a sale was finally made on the basis of $12,000, Scott pretending to buy one-half of the patent right and Wil-

son actually buying the other half and giving in payment for his half the promissory notes in question.

The court identifies as the substantial question in the case, the question whether the charge in the indictment and the evidence as to price were sufficient to establish the crime of false pretenses; and on this question, the court says:

> "That the contrivance between Nicholson and the plaintiff in error by which the trade was effected and the notes obtained from Wilson, was grossly unfair and dishonest in a moral point of view, must, of course, be admitted. But it does not follow from this that the transaction constituted crime of obtaining the signatures to the notes by false pretenses, as charged in the indictment. *Wilson, by the bargain got all he bargained for, and all he expected to get, to wit, the title to one-half of the patent right, and whether it was worth more or less than the price he agreed to pay by his notes, the case does not disclose.* THE CASE, AS IT STANDS UPON THE EVIDENCE, IS NOT THAT WILSON WAS REALLY INJURED AND SUFFERED LOSS BY THE BARGAIN, BUT THAT HE MIGHT HAVE MADE A MORE ADVANTAGEOUS PURCHASE AND GAINED MORE, HAD THE FACTS WITH REGARD TO WHAT NICHOLSON WAS TO RECEIVE, BEEN STATED AND MADE KNOWN TO HIM."

The court then considers the evidence in considerable detail, and proceeds:

> "No matter, so far as this question is concerned, how the price came to be fixed and asked, or pretended at that amount, it was, in fact, asked, and though it may have been asked for the purpose of taking a dishonest advantage of Wilson, the asking was the existing fact. No other price was asked or named or fixed between the parties to the transactions on that occasion than those above referred to.

> The motive in asking this large price is no consequence so far as this offense is concerned. If, in fact, the price was demanded by the seller, it would be a most extraordinary and unheard of thing to convict a merchant of obtaining money or the signature to a note by false pretenses because in selling his goods, by which the money or the note was obtained, he asked the purchaser, and obtained a higher price for the goods than his price mark, or than he had offered to sell the same goods to another customer, or than he would have been willing to take had the purchaser refused to give the pretended price asked and insisted strongly enough on a lower price."

The judgment was accordingly reversed and the discharge of the defendant was ordered.

It will be observed that this Scott case is a harder case in every aspect than the case now under consideration, because in the case under consideration, notwithstanding the higher price asked, the purchaser ultimately gets his merchandise at the figure which the retailer originally seeks, and the asking of the higher price inflicts no injury; whereas in the Scott case the transaction resulted in a payment by the purchaser of the whole amount of the increased price, and he actually paid a sum considerably in excess of the price originally sought by the owner of the patent. The case both in its authority and in its reasoning ought to settle the proposition that a representation as to price can under no circumstances constitute a false pretense.

It can not be successfully contended that these allegations with regard to price are in effect allegations as to value. Price and value are essentially

different. Value is the figure at which property is salable. Value can never be determined solely by the attitude of the seller. It invariably involves also the attitude of the buyer. It is familiarly defined as the amount for which property is sold by an owner who is willing but not compelled to sell, to a purchaser who is willing but not compelled to buy. The minds of both seller and purchaser must meet and coincide.

Price, on the other hand, is a thing wholly within the control of the seller. He may fix a price which is acceptable to the purchaser, or he may fix a price which is prohibitive.

To hold that the naming of a price by a merchant is in effect a representation of value and as such is unlawful when exaggerated, would result in the revolutionizing of the accepted methods of merchandising. It would destroy the historic privilege of the seller to enhance his prices, and the historic privilege of the buyer to depreciate them. The driving of a bargain would be an impossibility. Applying the suggested rule to the familiar methods of everyday business, the business of "two price houses" would be an unlawful business. Every sale made by a merchant or tradesman at a figure higher than by better bargaining he could have been induced to accept, would be subject to rescission for fraud. Advertisements of bargain sales would, in most cases, be subject to exclusion from the mails.

It may be unethical to misrepresent price in connection with a prospective sale. With that we are not concerned. It certainly is an ancient and uni-

versal custom and it could hardly be said that it was the intention of the framers of this statute to cleave so closely to the ethics of merchandising that henceforth a misrepresentation of this kind should be denounced as criminal.

Conclusion.

We accordingly submit:

I. That, the indictment in question is bad because it does not specifically inform the defendant of the charge which he will be called upon to meet.

II. That, the indictment is bad because it does not adequately show an intention to inflict property loss.

Respectfully submitted,

Roy D Keeler

Attorney for S. E. Moist,
Defendant in Error.

Mr. Assistant Attorney General Denison for the United States.

Mr. Roy D. Keehn for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment under § 215 of the Criminal Code of March 4, 1909, c. 321, 35 Stat. 1130, for placing a letter in the post-office for delivery by the post-office establishment for the purpose of executing a scheme to defraud. The scheme alleged was to send out puzzle pictures, advertising as a prize for the neatest correct answer a credit order for $350 on a certain piano, one for $300 for the next neatest, and others for $200 for correct answers. Persons answering were to be told that they were entitled, for instance, to an order for $200 on a piano sold the world over for $300, which would cost them $75 cash with the order. The credit was to be a pretense, as the piano to be delivered was to be one of a retail price not exceeding the cash received. It was not alleged that the piano was to be worth less than the cash paid, but, as is manifest, people were to be led into the dealing by the delusive apparatus of a promise known to be false when made, *Durland* v. *United States*, 161 U. S. 306, and false statements as to the value of the piano bought. The indictment was demurred to and the demurrer was sustained.

It will not be necessary to decide whether the facts alleged show a scheme to defraud, since it does not appear on what ground the court acted. As was said in *United States* v. *Carter*, *ante*, pp. 492, 494: "there is nothing in the record showing any request made to the trial court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute or merely upon the meaning which was given to the indictment." As it does not appear that the judgment

turned upon any controverted construction of the statute, the writ of error must be dismissed in this case as in that. It is unnecessary to consider whether every determination concerning the common law of fraud taken for granted by the act would be a decision based upon the construction of the statute, within the meaning of the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Writ of error dismissed.

RAINEY *v.* W. R. GRACE & COMPANY.